

REMARKS/ARGUMENTS

In the restriction/election of species requirement dated September 17, 2007, the Examiner delineated the following inventions as being patentably distinct.

Group I. Claim(s) 1-11, drawn to a fat composition.

Group II: Claim(s) 12 and 13, drawn to a method for improving central nervous function which comprises administering a fat composition.

Group III: Claim(s) 14 and 15, drawn to a method of preparing the fat composition.

The Examiner further required that Applicants elect a single disclosed species from each of the following:

- (i) a phospholipid in Claim 2
- (ii) a plant in claim 3
- (iii) a compound or crude drug in claim 6
- (iv) n-3 polyunsaturated fatty acids as in claims 10-15.

Accordingly, Applicants elect, with traverse, Group I and the following species from each of groups (i)-(iv).

- (i) phosphatidyl serine (phospholipid in claim 2)
- (ii) Linseed (plant in claim 3)
- (iii) ginkgo biloba (drug in claim 6)
- (iv) docosahexaenoic acid (n-3 polyunsaturated fatty acids in claims 10 and 11)

Claims 1-11 read on the elected invention.

Restriction is only proper if the claims of the restricted groups are either independent or patentably distinct and there would be a serious burden placed on the Examiner if restriction is not required (M.P.E.P. §803). The burden of proof is on the Examiner to provide reasons and/or examples to support any conclusion in regard to patentable distinction

(M.P.E.P. §803). Moreover, when making a lack of unity of invention in a national stage application, the Examiner has the burden of explaining why each group lacks unit with each other (i.e., why there is no single inventive concept) specifically describing the unique special technical feature in each group (M.P.E.P. §1`893.03(d)). Applicants respectfully traverse the restriction requirement on the grounds that the Examiner has not carried out the burden of providing any reasons and/or examples to support any conclusions that the groups lack unity of invention.

The Examiner asserts that Groups I-III do not relate to a single general inventive concept under PCT 13.1 and 13.2 because they lack the same corresponding special technical feature.

The Examiner, however, has not considered that the claims in each group are considered related inventions under 37 C.F.R. §1.475(b) in which the inventions are considered to have unity of invention.

All of the claims are directed to a fat composition and to the use thereof for improving the central nervous and circulatory function.

Applicants submit that while PCT Rule 13.1 and 13.2 are applicable, 37 C.F.R. §1.475(b) provides in relevant part that “a national stage application containing claims to different categories of invention will be considered to have unity of invention if the claims are drawn to ... (3) a product, process especially adapted for the manufacture of said product and the method of using said product.”

Composition, method of making, and the method of use should be examined together. It is a technical relationship that involves the same features and it is this technical relationship that defines the contribution which each of the Groups taken as a whole makes over the prior art.

Final product, method of making, and using are all interdependent and should be examined together on the merits, especially when the sole disclosed utility of the product is that recited in the specification. Different classification of subject matter to be divided is not conclusive proof of independent status and divisibility.

Applicants respectfully traverse on the grounds that the Office has not shown that a burden exists in searching the entire application.

Further, the M.P.E.P. §803 states as follows:

If the search and examination of an entire application can be made without a serious burden, the Examiner must examine it on the merits even though it includes claims to distinct and independent inventions.

Applicants submit that a search of all the claims would not constitute a serious burden on the Office. In fact, the International Search Authority has searched all of the claims together. As the Office has not shown that a restriction should now be required when the International Preliminary Examination Report did not, the restriction is believed to be improper.

Applicants request that if the invention of Group I is found allowable, withdrawn Groups II and III which include all the limitations of the allowable claims, be rejoined.

Applicants further request that should the elected species be found allowable, the Examiner expand the search to include non-elected species.

Divisional applications filed thereafter claiming the non-elected species should be subject to a double-patenting ground of rejection 35 U.S.C. §121, In re Joyce, (Commr. Pat. 1957) 1125 USPQ 412.

Application No. 10/582,940
Reply to Restriction/Election of Species Requirement of September 17, 2007.

Applicants submit that the above-identified application is now in condition for examination on the merits, and an early notice of such action is earnestly solicited.

Respectfully submitted,

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